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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF ALAMEDA, a municipal corporation,
Petitioner,

vs.

PREMIER COMMUNICATIONS NETWORK, INC.,
a California corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE OF THE STATE OF CALIFORNIA

CARTER J. STROUD
Counsel of Record
City Attorney
City of Alameda
City Hall, Room 314
Santa Clara at Oak Street
Alameda, California 94501
Telephone (415) 522-4100
Attorney for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED FOR REVIEW

1. Are taxing agencies prohibited under *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev. (infra)* from applying a tax rate to a first amendment business unless the same tax rate (or method of computing the tax) applies to all other taxpayers?

TABLE OF CONTENTS

	Page
Questions presented for review	i
The opinion below	1
Grounds for jurisdiction	1
Constitutional and statutory provisions	1
Statement of the case	5
Argument	7
I	
Introduction	7
II	
The opinion creates tax loopholes not permitted by other provisions of the Constitution where no potential prior restraints justify that result	9
A. Introduction	9
B. Legislatures decide who shall bear the burden of taxation	9
C. The impact of the opinion below	11
D. No prior restraints result from the tax	11
III	
The court below has misapplied the Minneapolis Star holding	12
IV	
The court below confused and incorrectly applied standards of review for the First Amendment	16
A. Prior restraint should not be presumed here	16
B. The court below adopted a procedure which mandated the wrong result	17
Conclusion	21

TABLE OF AUTHORITIES CITED

Cases

Page

A. Magnano Co. v. Hamilton (1933) 292 U.S. 40, 54 S.Ct. 599 ..... 9, 10, 11

Bates v. State Bar of Arizona (1977) 433 U.S. 350, 97 S.Ct. 2691 17

Bunker Hill Associates v. City of Los Angeles (1982) 137 Cal.App.3d 79 10

Central Hudson Gas v. Public Service Com'n of N.Y. 1980 447 U.S. 557, 563, 100 S.Ct. 2343 17

Century Federal v. City of Palo Alto, Cal. (N.D.Ca. 1984) 579 F.Supp. 1553 17

City of Los Angeles v. Vincent (1984) ..... U.S. ....., 104 S.Ct. 2118 ..... 8, 17, 18, 19, 20, 21

City of New Orleans v. Dukes (1976) 427 U.S. 297, 96 S.Ct. 2513 9

Commonwealth Edison Co. v. Montana (1982) 453 U.S. 609, 101 S.Ct. 2946 9

F.C.C. v. National Citizens Com. for Broadcasting (1978) 436 U.S. 775, 98 S.Ct. 2096 17

Fox etc. Corp. v. City of Bakersfield (1950) 36 Cal.2d 136 10

Friedman v. Rogers (1979) 440 U.S. 1, 99 S.Ct. 887 17

Grosjean v. American Press Co. (1936) 297 U.S. 233, 56 S.Ct. 444 ..... 12, 14, 19, 21

Lehnhausen v. Lake Shore Auto Parts Co. (1973) 410 U.S. 356, 93 S.Ct. 1001 9

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev. (1983) 460 U.S. 575, 103 S.Ct. 1365 ..... 8, 12, 13, 14, 15, 18, 19, 21

Miranda v. State of Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602 ..... 8, 16

Table of Authorities Cited

Cases

Page

Murdock v. Commonwealth of Pennsylvania (1943) 319 U.S. 105, 63 S.Ct. 870 ..... 12, 19

Ohralik v. Ohio State Bar Assn. (1978) 436 U.S. 447, 98 S.Ct. 1913 17

Pittsburgh v. Alco Park Corp. (1973) 417 U.S. 369, 94 S.Ct. 2291 ..... 10, 11

Red Lion Broadcasting v. F.C.C. (1969) 365 U.S. 367, 89 S.Ct. 1794 17

South Carolina v. Regan (1984) ..... U.S. ....., 104 S.Ct. 1107 16

Territory of Alaska v. Journal Printing Company (Alaska 1955) 135 F.Supp. 169 10

United States v. O'Brien (1968) 391 U.S. 367, 88 S.Ct. 1673 19

Web Service Co. v. Spencer (1967) 252 Cal.App.2d 827 10

Willingham Bus Lines, Inc. v. Municipal Court (1967) 66 Cal.2d 893 10

Constitution

United States Constitution:

First Amendment 13, 17, 18, 21

Fourteenth Amendment 1

Statutes

Government Code, Section 53066 12

28 U.S.C. Section 1257 1

47 CFR 76.31 12

Miscellaneous

City of Alameda Ordinance, No. 1991 ..... 2, 3, 4, 6, 7

36 FCC 2d 143 11

61 FCC 2d 452 12

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PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE OF THE STATE OF CALIFORNIA

Petitioners pray that a writ of certiorari be issued to the Court of Appeal, First Appellate District, Division One of the State of California to review this case after judgment.

THE OPINION BELOW

The opinion of the Court of Appeal of the State of California, reported in 156 Cal.App.3d 148, its denial of a rehearing and a denial of the petition for hearing to the California Supreme Court are attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

The opinion and judgment of the Court of Appeal was filed on May 22, 1984. Rehearing was denied on June 21, 1984. Hearing in the California Supreme Court was denied on August 15, 1984. (Appendix A).

This Court has jurisdiction under 28 U.S.C. 1257 to hear the case by writ of certiorari. The court below held that the ordinance in question was repugnant to the federal constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment XIV of the Constitution of the United States:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment I of the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise there-

of; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ordinance No. 1991 N.S. of the City of Alameda, California:

CITY OF ALAMEDA ORDINANCE NO. 1991
New Series
AMENDING THE BUSINESS LICENSE TAX OF THE CITY OF ALAMEDA

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALAMEDA that:

Section 1. The Alameda Municipal Code is hereby amended by adding Section 13-111(s) to Article 1 and Sections 13-1951 and 13-1952 to Article 9 of Chapter 1, Title XIII, thereof, to read as follows:

Sec. 13-111. (s) Television Subscription Service. "Television subscription service" shall mean a business that sells rights to or subscriptions for the receipt of television signals not available by use of standard antennae. Television subscription service includes, but is not limited to, community antenna systems or other antenna systems required to receive satellite signals or any signal which requires the use of a specific antenna or decoding or unscrambling device.

Sec. 13-1951. Television Subscription Service.

(a) Every person conducting a television subscription service business shall pay an annual license fee based upon three percent (3%) of the gross receipts of Alameda subscription sales or fees for the previous year, as defined by Section 13-1104, except that the first year's fee shall be three percent (3%) of subscription fees payable thirty (30) days after the subscription is paid.

(b) In the event that state or federal law preempts the amount chargeable as a tax or franchise fee said annual license fee shall be the maximum allowed under state or federal law not in excess of subsection (a).

(c) No license may be issued under this Chapter for television subscription service if the City Council may lawfully require a franchise agreement between the television subscription service operator and the City until such agreement is executed.

Sec. 13-1952. Emergency Communications Systems. Every person conducting the business of providing fire or police or other emergency communications systems or alarms shall pay the annual license fee set forth for television subscription service (Sec. 13-1951). Persons providing both television subscription service and services hereunder may combine their sales and pay the tax on all receipts under either this Section or Section 13-1951.

Section 2. The Alameda Municipal Code is hereby amended by amending Section 13-1102 of Article 10, Chapter 1, of Title XIII thereof, to read as follows:

Sec. 13-1102. Excluded. Persons required to pay license fees under Sections 13-195, 13-195.1, 13-197, 13-1913, 13-1919, 13-1920, 13-1922, 13-1931, 13-1938, 13-1951, and 13-1952 and persons with no previous years' gross receipts shall not pay in lieu fees under this article.

Section 3. Purpose. This ordinance is adopted for revenue purposes only. Only local subscription sales shall be taxed and no regulatory measures unrelated to solicitations are implied herein.

Section 4. This ordinance provides for a tax levy for the usual and current expenses of the City and shall be in full force and effect immediately upon final passage, pursuant to Section 3-11 of the Charter of the City of Alameda.

/s/ C. J. CORICA
Presiding Officer of the Council

Attest:

/s/ Deen Speegle
City Clerk

* * * * * *

I, the undersigned, hereby certify that the foregoing Ordinance was duly and regularly adopted and passed by the Council of the City of Alameda in regular meeting assembled on the 4th day of December, 1979, by the following vote, to wit:

AYES: Councilmen Diament, Stone, Tillman, and President Corica—(4)

NOES: Councilman Sherratt—(1)

ABSENT: None

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said City this 5th day of December 1979.

/s/ DEEN SPEEGLE
City Clerk of the City of Alameda

STATEMENT OF THE CASE

Petitioner, City of Alameda, (hereinafter "City") employs a business license tax as a revenue raising measure. All persons doing business in the City are covered by the tax. Just before it issued a cable television franchise (for the first time) the City amended the business license tax chapter of its Code by establishing a new classification for this most recent business—pay television. There are two kinds of pay television: cable providers (CATV) which operate under City franchise, and off-the-air (MDS) systems, which use microwave transmitters and decoding antennae devices. Respondent ("Premier") is the latter. It started business in Alameda about a year before the new classification was adopted.

Premier refused to pay the business license tax. City filed suit. Premier contended by way of answer and cross-complaint that the ordinance violated, among other things, the First Amendment of the Federal Constitution. (Appendix B). Just prior to trial this Court decided *Minneapolis Star (infra)*. Cross motions for judgment on the pleadings were filed. Premier's motion was granted on the basis that the ordinance violated first amendment rights. (Appendix C). The Court of Appeal heard and decided the case entirely on first amendment grounds. (Appendix A).

The decision of the California Court of Appeal became final when the California Supreme Court refused to hear it. (Appendix A). The federal question was raised and adjudicated at every stage of the proceedings. The federal question is substantial and the decision is not based on state grounds.

The record discloses the following undisputed facts. Premier sells television programming consisting of movies and sports events throughout the Bay Area. It transmits these programs from Berkeley, California and has its business office in Burlingame, California. Its activities in the

other Bay Area cities, including Alameda, consist of executing subscription agreements and the installation of an antenna which permits the user to receive Premier's off-the-air signal. The signal cannot be received without this decoding device which Premier leases to its customers. This equipment is maintained by Premier and serviced in Alameda.

City adopted Ordinance No. 1991 N.S., effective December 4, 1979, *supra*. The ordinance amended that Chapter of the Municipal Code containing the business license provisions by adding the sections at issue here. (Appendix D).[1] The tax rate for pay television thereunder is three percent (3%) of gross revenues. These provisions "constitute a tax for municipal revenue purposes only, and are not regulatory fees." Sec. 13-133. (Appendix D, p. 9).

The business license tax employs flat rates, unit rates (number of employees, rooms, seats, etc.) and gross receipts as methods of computing the tax. Most taxpayers are permitted an in lieu tax rate based on gross receipts. Sec. 13-1101. (Appendix D, p. 49). Given the rates of the in lieu tax (Sec. 13-1105) a business would have to be very poor for the in lieu tax liability to be lower than the flat or unit tax liabilities. (Appendix D, p. 54). Not all taxpayers are permitted the in lieu tax rate. Drive-in theaters and outdoor advertisers, e.g., are taxed on gross receipts only (Secs. 13-1938 and 13-195) and therefore are not permitted the in lieu option (Sec. 13-1102). (Appendix D, p. 41, p. 20 and p. 49). Like outdoor advertisers, the subscription television tax is based solely on gross receipts.[2] Offering an in lieu (lower rate) would simply nullify any other rate.

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[1]All City ordinance section numbers referred to herein are set forth in Appendix D.

[2]Outdoor advertisers pay a minimum of 2% on their gross revenues ($300 is 2% of $15,000) and a maximum of 1.2% on gross revenues of $75,000 ($900 is 1.2% of $75,000). They never pay less than ½% ($150 is ½% of $30,000) plus $900. Sec. 13-195. (Appendix D, p. 20).

There are several classes of taxpayers that pay relatively higher flat rates for short term uses that are also not permitted the gross receipts option. Advertising vehicles pay $75, Sec. 13-196 (Appendix D, p. 21), amusement parks pay $75 or $65 for each device, Sec. 13-197, (Appendix D, p. 22), boxing and wrestling exhibits pay $150 quarterly, (Sec. 13-1913), handbill distributors pay $120 (Sec. 13-1919), herb dealers pay $75 or $225 (Sec. 13-1920), hotels and apartments pay $4 per room (Sec. 13-1922) and dance halls pay $15 to $60 (Sec. 13-1931). (Appendix D, p. 25, p. 28, p. 30, and p. 36).

City ultimately decided to franchise CATV, rather than merely collect a business license tax. The franchise fee is also three percent (3%) of gross revenues. Section 16(a) of the Franchise Ordinance (Appendix E, p. 3). To avoid a double contribution to the general fund the Enabling Ordinance provides that the franchise fee "shall be in lieu of" the business license tax "to the extent" actually paid. Section 12.1 (F). (Appendix F, p. 5). The trial court determined that the tax did not apply to CATV, or in the alternative, that the credit mechanism also constituted differential treatment. (Appendix C). The Court of Appeal ignored these two erroneous interpretations of the ordinances and decided the case on the basis of differential tax rates shown on the face of the ordinance. (Appendix A).

ARGUMENT

I

INTRODUCTION

The court below has, for the first time in American jurisprudence, applied the First Amendment to invalidate a tax rate. It has decided, for the first time, the facial validity of a tax by comparing the tax liabilities of all the entities subject to a generally applicable *nexus* of taxation: here, the City's business license tax. The court below held that the business license tax could not be applied to a particular taxpayer by reason of the fact that

taxpayer's tax liability exceeded the liability of other taxpayers who were not within the same *rate* classifications as Premier under the business license tax. The lower court's analysis and holding prevent the application of anything but uniform tax rates to first amendment businesses, and its "differentially burdensome" rationale can be applied to financial burdens imposed upon first amendment users by means other than taxation. Premier's attornies are already contending in another action that this case prohibits the imposition of franchise fees against cable television companies. Under this holding all kinds of first amendment claimants, lawyers, public relations firms, consultants, may claim that their business license tax cannot exceed any other business license taxpayers' liability.

Certainly, tax rates are not always uniform. The question is one of general importance which has not been decided by any other court. The court below relied on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.* (1983) 460 U.S. 575, 103 S.Ct. 1365. While purporting to only find the tax invalid as applied to Premier the court below actually held the tax invalid on its face and announced a new rule that government must create comparable tax liabilities for all taxpayers if it wishes to tax any first amendment business. As we shall demonstrate, this is an unwarranted extension of the rule announced in *Minneapolis Star*. Certiorari should be granted to "further explore some facets of the problem, thus exposed" by *Minneapolis Star. Miranda v. State of Arizona* (1966) 384 U.S. 436, 441-442, 86 S.Ct. 1602, 1610-1611.

The court below also applied a standard of review inconsistent with this Court's most recent opinion on that subject in *City of Los Angeles v. Vincent* (1984) ..... U.S. ....., 104 S.Ct. 2118.

II

THE OPINION CREATES TAX LOOPHOLES NOT PERMITTED BY OTHER PROVISIONS OF THE CONSTITUTION WHERE NO POTENTIAL PRIOR RESTRAINTS JUSTIFY THAT RESULT

A. Introduction

First, some general principles will show how the rule announced by the court below radically undermines the doctrine of separation of powers in tax matters. Historically, the First Amendment has had very little impact on taxation. The opinion overrules (*sub silentio*) Equal Protection and Due Process doctrines never questioned in our history.

B. Legislatures Decide Who Shall Bear the Burden of Taxation

Relative burdens and degrees of taxation have always been political questions. Tax *rates* have been virtually unassailable in the courts. "Revenue taxes" need not relate to "value of services provided a taxpayer." *Commonwealth Edison Co. v. Montana* (1982) 453 U.S. 609, 622, 101 S.Ct. 2946, 2956. Only "palpable arbitrary" or "invidious" classifications violate Equal Protection even where "the collateral effect of restricting or even destroying an occupation or a business" may result from its application. *Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S. 356, 360, 93 S.Ct. 1001, 1004. The court below found, as the constitutional fact relied on, that the tax in question discriminated against Premier. Under Equal Protection immensely greater degrees of "discrimination" are left to "the wisdom of" the people's representatives or "legislative policy determinations" in the "local economic sphere." *See, City of New Orleans v. Dukes* (1976) 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517. *See,* for example, *A. Magnano Co. v.*

Hamilton (1933) 292 U.S. 40, 54 S.Ct. 599 and *Pittsburgh v. Alco Park Corp.* (1973) 417 U.S. 369, 94 S.Ct. 2291.[3]

In the Due Process area the same principle applies. Only in extreme situations will the court interfere with legislative determinations of who shall bear the burden of taxation. Due Process applies only where the tax is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes in substance and effect, the direct exertion of a different and forbidden power, as for example, the confiscation of property." *Magnano,* at p. 44 (S.Ct. p. 601). Significant gross receipt taxes on newspapers have been upheld. *Territory of Alaska v. Journal Printing Company* (Alaska 1955) 135 F.Supp. 169 (and cases cited therein).

"The premise that a tax is invalid if so excessive as to bring about the destruction of a particular business (has been uniformly rejected)." *Pittsburgh v. Alcoa Park Corp., supra,* at p. 374 (S.Ct. 2295). This Court's attitude concerning the *amount* of taxes is succinctly summarized in *Magnano.*

> "If the tax imposed had been 5 cents instead of 15 cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise, which, standing alone, this court heretofore

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[3]California cases are clear on the point as well. *Fox etc. Corp. v. City of Bakersfield* (1950) 36 Cal.2d 136, 142; *Web Service Co. v. Spencer* (1967) 252 Cal.App.2d 827, 833 and *Bunker Hill Associates v. City of Los Angeles* (1982) 137 Cal.App.3d 79. Different methods of computing a tax was specifically approved in *Willingham Bus Lines, Inc. v. Municipal Court* (1967) 66 Cal.2d 893.

has uniformly rejected as furnishing no juridical ground for striking down a taxing act." *Id.* at p. 47 (S.Ct. 602).

C. The Impact of the Opinion Below

Because the opinion, in fact, equates differential treatment with discrimination, based on the dollar amounts required of different taxpayers, all the law cited above has been reversed for anyone who can claim the now coveted status of a first amendment business. In short, the opinion has created a new tax loophole. Among other things, margarine can be treated differently than butter (*Magnano*) and municipal parking lots can be distinguished from private parking lots (*Pittsburgh*), but pay television must enjoy the lowest tax rate applicable under the form of taxation (here, a business license) applied. No bench mark or test to determine the limit of "discrimination" can be found or is even inherent in the absolute nature of the opinion. For example, if the City were to place Premier's business in the same category as outdoor advertisers, it appears from the the lower court's analysis of the facts that the tax would then be invalid as to both Premier and the advertisers because those businesses would be paying *at least* two and one-half times more tax than many others. *See,* footnote 6 of the opinion. (Appendix A). By a process of elimination the City would find itself in a position where it could only apply the same tax rate to everyone or apply the lowest rate to the panoply of first amendment claimants in order to tax a first amendment business at all.

D. No Prior Restraints Result From the Tax

The tax will not *in fact* inhibit Premier's business.[4] It amounts to a few cents per customer per month. The FCC, which views cable television franchise fees as a "regressive tax" (36 FCC 2d 143, 209), approves a charge as high as

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[4]In any case there is no record on that point.

five percent (5%), which it raised to that amount after noting a "robust growth" of the industry (66 FCC 2d 380, 402).[5] 47 CFR 76.31. Premier sells essentially the same programming as cable television. The State of California has also sanctioned fees as high as five percent (5%) for CATV pay television. Gov. Code § 53066.

III

THE COURT BELOW HAS MISAPPLIED THE MINNEAPOLIS STAR HOLDING

The anomalies created by the opinion result from assimilating concepts based on discriminatory treatment to concepts applicable to prior restraints. The First Amendment is rarely, and only indirectly, concerned with discrimination. In previous first amendment tax cases this Court addressed direct taxation of the exercise of speech (*Murdock v. Commonwealth of Pennsylvania* (1943) 319 U.S. 105, 63 S.Ct. 870) and a tax which, by virtue of an exemption based on circulation, directly discriminated against large newspapers vis-a-vis small newspapers (*Grosjean v. American Press Co.* (1936) 297 U.S. 233, 56 S.Ct. 444). Neither of those cases suggests that differences in tax rates may create prior restraints.

Minneapolis Star held that special and unique taxes imposed on first amendment disseminators, as a matter of law, raise the potential for prior restraints. "Special" and "unique" refer to a taxable event or *nexus* not employed to tax others. The analysis of these factors did not refer to tax rates or ultimate tax liability (in dollars). A cursory comparison of the two opinions makes the point. "Minnesota, however, has not chosen to apply its sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications." *Minneapolis Star,*

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[5]The FCC has also issued a certificate approving a franchise agreement where a 5% business license tax was employed. 61 FCC 2d 452.

supra, 103 S.Ct. at 1370. The "ordinary rule in Minnesota" is "to tax only the ultimate, or retail sale rather than the use of components like ink and paper." *Id.*, at p. 1370. The issue is stated as:

> "By creating this special tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We must determine whether the First Amendment permits such special taxation. A tax that [so] *burdens* rights protected by the First Amendment cannot stand unless the *burden* is necessary to achieve an overriding governmental interest." *Id.*, at pp. 1370-1371. (emphasis added)

The term "differential treatment" there references a tax which applied to *no* other form of doing business. In *Minneapolis Star* only the press was taxed on the basis of that particular taxable event—a "use tax" on purchase of components for the manufacture of their product. This Court eschewed the dissent's observation that the tax liability (the dollar amount) might *actually be lower* for the taxpayer because the "burden" found by the majority was *not* the tax liability.[6] "We would be hesitant to fashion a rule that automatically allowed the state to single out the press for a different *method* of taxation as long as the *effective* burden was no different from that on other taxpayers or the [effective] burden on the press was lighter than that on other businesses." *Id.*, at p. 1374 (emphasis added). The Court draws a clear distinction between the "burden" imposed (on the exercise of the First Amendment) by a unique taxing method (*nexus* or event) and the burden of a tax liability ("effective burden" or actual dollar amount), which this Court made clear is not proscribed by the First Amendment.

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[6]In the context of *Minneapolis Star*, "burden" refers to a burden on the *exercise of the First Amendment*, not tax liability *per se*. The court below changed the semantics of the word completely.

In *Minneapolis Star*, this Court merely extended the rule in *Grosjean*. The Court added to the prohibition against classifying members of the press differentially (by use of an exemption based on circulation) a prohibition against classifying any members of the press differentially by use of [a taxable *nexus* not applicable to *any other* taxpayer.][7] The tax liability resulting from such a classification was held irrelevant. The Court found the tax facially invalid because of its potential for prior restraint.

The court below improperly summarizes *Minneapolis Star* by stating:

> "The Court reasoned that the state's interest in requiring the press to bear its *share of the tax burden* could be achieved by taxing the press *equally* with others, thus avoiding differential tax treatment in accomplishing its revenue generating objectives." (emphasis added) (Appendix A, at p. 12).

Therefore, the court below finds, as a constitutional fact from the face of the ordinance, a "differentially burdensome" tax.[8] (Appendix A, at p. 13). The court below analyzed differences in tax *liabilities*. This Court analyzed different methods of *imposing* a tax.

As an alternative rationale the court below used the inapplicability of the in lieu tax *rate* (potentially different tax liability) as a ground for finding differentially burdensome treatment. (Appendix A, at p. 16). The analysis used below is precisely the analysis suggested by Justice Rehnquist in his dissent and rejected by this Court. The only difference is the fortuitous circumstance that the tax *liability* here may be higher, rather than lower. The court below converted this Court's absolute ban on the use of

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[7]The court below turned the bracketed portion of this sentence into [a *rate* not applicable to *every* tax payer].

[8]This Court never used that terminology.

different taxable events (or *nexus*) to a ban on different tax liabilities.[9]

Grammar does not serve logic when applied out of context. One can say that differential treatment occurs whenever the press is not treated "equally", but the statement means nothing unless we know how the press must be treated equally. The *basis* for taxation, not tax liability, provides the context. *Minneapolis Star* is distinguishable and inapplicable in this case.

Requirements such as obtaining permits (e.g., parade), or *regulator* licenses (e.g., vendors), and provisions which permit arrest (of speakers) or seizure (of materials) without prior judicial determinations (e.g., obscenity) meet the test of a prior restraint. A general revenue tax does not. "It is beyond dispute that (governments) can subject newspapers to generally applicable economic regulations without creating constitutional problems." *Id.*, at pp. 1369-1370. A tax based on a discriminatory *nexus* (applicable to no one else) "suggests that the goal is not unrelated to suppression of expression" and therefore also qualifies. *Id.*, at p. 1372. A presumption that a difference in tax rates might be related to the suppression of expression has never existed before. The danger inherent in *Minneapolis Star* is an interpretation that it requires no actual or even likely prior restraint. The language of the opinion could be, as it was by the court below, misread that way. *See* e.g., footnote 9. Under the decision below, *Minneapolis Star* threatens to do to the First Amendment what *Miranda* did to the Fifth Amendment. As the court below read it,

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[9]"In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment." *Id.* at p. 1375. The "proposed rule" was an argument by the State that the tax was valid as a substitute for a tax of general applicability as long as the actual tax liability did not exceed what it would be under the general tax. The court rejects here any justification for a unique tax *nexus* and also rejects analysis of tax liabilities.

a prior restraint will be *assumed* whenever any other taxpayer pays less, regardless of the lack of significant impact of the amount of the tax on the taxpayer.[10]

IV

THE COURT BELOW CONFUSED AND INCORRECTLY APPLIED STANDARDS OF REVIEW FOR THE FIRST AMENDMENT

A. Prior Restraint Should Not Be Presumed Here

At times, courts have fashioned procedures for review, such as standards for who shall carry a particular burden of proof, to decide cases which, for reasons of public policy, do not appear amenable to the usual fact finding process. The court below prematurely shifted the burden of proof to the City. "Differential treatment" was literally applied by the court below out of context to create a new doctrine of "differentially burdensome" treatment. Justice Stevens recently discussed the use of such "seductive *cliches*" as "constitutional mandates" in *South Carolina v. Regan* (1984) ..... U.S. ....., 104 S.Ct. 1107, 1131, at n. 7. (Concurring and dissenting opinion of Justice Stevens.) We believe the opinion below and its analysis of the term "differential treatment" creates the same kind of "pernicious abstraction" dealt with summarily there. The unintended consequences of the mechanical application of the rubric created by the court below are shocking. Virtually anything, short of absolute uniformity, is "differentially burdensome."

The court below also found that Premier engaged in a first amendment business. That alone does not invoke the analytical framework applied in the opinion. It is a "fundamental proposition that there is no 'unabridged First Amendment right to broadcast comparable to the right of

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[10]An analogy may be drawn to the *Miranda* approach where evidence is not stricken on the basis of its unreliability or unfairness, but instead to protect the integrity of the Constitution.

every individual to speak, write or publish'." *F.C.C. v. National Citizens Com. for Broadcasting* (1978) 436 U.S. 775, 799, 98 S.Ct. 2096, 2114. The rights of broadcasters are not as great as the rights of the general public. *Red Lion Broadcasting v. F.C.C.* (1969) 365 U.S. 367, 89 S.Ct. 1794. The First Amendment does not provide a talisman against the usual burdens of government. This court is flexible in weighing the interests involved in this case. In the commercial speech area, e.g., overbreadth (the heart of many regulatory cases) does not apply. *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691 and *Friedman v. Rogers* (1979) 440 U.S. 1, 99 S.Ct. 887. This Court does not treat those regulatory cases on a "par" with other regulatory cases. *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 456, 98 S.Ct. 1913, 1918. Pay television is not the same thing as newspapers.[11] A "lesser" degree of protection may be afforded different interests. *Central Hudson Gas v. Public Service Com'n of N.Y.* (1980) 447 U.S. 557, 563, 100 S.Ct. 2343, 2350. Indeed, an all or nothing approach promotes a "devitalization" or "dilution" of the First Amendment. *Ohralik*, at p. 456 (S.Ct. p. 1918).

B. The Court Below Adopted a Procedure Which Mandated the Wrong Result

The incorrect procedure used below has just been analyzed and disapproved by this Court in *City of Los Angeles v. Vincent, supra*. This Court made it clear that it will circumspectly apply analysis of constitutional facts requiring shifting of the burden of proof in First Amendment cases. In *Vincent* this Court held that a total ban on posting signs on public property was valid. The public purposes supporting the ordinance were aesthetic (freedom from sign clutter) and traffic safety. The Court of Appeal had required

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[11]The court below assumes the opposite, but in fact the matter is still being debated by other courts. *See, Century Federal v. City of Palo Alto, Cal.* (N.D.Ca. 1984) 579 F.Supp. 1553, 1562.

the city to prove that it was conducting a comprehensive program against visual blight which would justify application of the ordinance to the plaintiff (a political sign company), the implication being that anything less would discriminate against a first amendment business. The Court of Appeal also rejected the traffic safety justification because something less than a total ban could be adopted to serve those ends. This Court's opinion in *Vincent* makes it clear that the Court of Appeal was incorrect in treating the ordinance as presumptively invalid because the First Amendment was involved. "But to say the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation.*" *Id.*, 104 S.Ct. 2128. The Court of Appeal, rather than searching the record for the constitutional facts necessary to invoke the First Amendment and shift the burden of proof, had shifted the burden of proof, in the first instance, and required the city to justify the ordinance by proving that nothing else but the total ban could serve the city's purposes. Under the analysis of *Vincent,* the ordinance should not have been treated as facially invalid or overbroad in the first place.

Here, the court below has applied the facially invalid approach to hold an ordinance invalid *as applied.* Because Premier markets a speech product the court required the City to prove that it cannot achieve its goal (tax revenue) some other way. The court justified the imposition of this obviously impossible burden of proof by equating "differentially burdensome" treatment with different tax *liabilities* instead of "special" or "unique" taxable events. The court then held the tax invalid *as applied to Premier's first amendment business* only. But in fact, the court holds the ordinance invalid on its face.[12] Its attempt to pretend otherwise will create considerable confusion in the future.

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[12]Under *Minneapolis Star* a special or unique tax could *never* be valid as applied.

If the court below were, in fact, to consider the ordinance as applied it would have to reverse itself or at least remand. The determination of the FCC and State of California in relation to other forms of pay television leaves no question that the ordinance is valid as applied. Moreover, the "framework for reviewing a viewpoint [content] neutral [enactment]" (as all taxes are), is *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673 (cited in *Vincent* at 104 S.Ct. 2129).[13] A tax necessarily meets the first two tests of *O'Brien*.[14] A revenue measure meets the third test unless it applies directly to speaking activities *(Murdock)*, discriminately applies to speakers within the same media (*Grosjean*) or applies facially only to businesses engaged in speech (*Minneapolis Star*).[15] The court below used the latter case and a literal application of the fourth test to justify a presumption that differential tax rates are also related somehow to the suppression of expression. We have already pointed out why *Minneapolis Star* does not apply. A literal application of the fourth test would invalidate, as the court below did, all differences in *tax liabilities* since someone else can *always* be taxed instead. But this Court did not literally apply the fourth test in *Vincent*. It in fact gave

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[13]*O'Brien* was cited in *Minneapolis Star* also as setting forth the test where balancing interests are appropriate. 103 S.Ct. at 1372, n. 7. The opinion went on to hold the Minnesota statute invalid on its face, however. We find *O'Brien* inappropriate in tax cases, with the possible exception of the third test. The third test is not unlike the due process "confiscatory" test which we believe along with the Equal Protection Clause provides adequate protection in the area of tax rates. *See,* Paragraph II, *supra.*

[14]"[A] government regulation is sufficiently justified if it is (1) within the constitutional power of the government; (2) if it furthers important or substantial government interests; (3) if the government interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest." at p. 377 (S.Ct. 1679).

[15]In our opinion this is the *ratio decidendi* for *Minneapolis Star.*

the city considerable latitude to show that a total ban "responds precisely to the substantive problem which legitimately concerns the city." *Id.*, at p. 2131. The *Vincent* court refused to compare other forms of clutter with the one addressed by the ordinance before it. *Id.*, at p. 2131.[16] Similarly, this Court should not compare the tax *rates* of others to determine whether a prior restraint exists when the ordinance is applied to Premier. The "as applied" decision of the court below relates to tax *liability*. Is the resulting tax liability (3%) a prior restraint? The experts in the field (FCC) think not. No record exists to go behind the ordinance. Under the opinion below, although the tax liability is reasonable, it can never exceed the tax liability of others, even where the taxable event (*nexus*) is the same. The opinion creates, by virtue of an incorrect syllogism slavishly applied, the doctrine of equal taxation.

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[16]There is, of course, no record on the point here because the trial court decided the case on judgment on the pleadings. The City's inability to tax Premier by any other means (it having no *nexus* other than doing business in the City) while other businesses receiving the same services pay other taxes (property and sales) as well as the business license tax, creates a tax inequity which the higher rate for Premier's kind of business addresses. However, given the facially modest rate and the FCC's position on fees and taxes, the City should not have to prove a need for the higher rate because that kind of "burden" invokes no prior restraint under settled constitutional theory.

CONCLUSION

In recent years this Court has been expanding the First Amendment in ways that an earlier court expanded the Fourth and Fifth Amendments. However, each new branch of this Court's first amendment doctrines has been pruned back as soon as attempts were made to extend it too far. The commercial speech cases and *Vincent* cited herein demonstrate that point. *Minneapolis Star* may be considered by some as the First Amendment equivalent of a *Miranda* decision because it may be invoked when the mere possibility of a prior restraint appears, without any indication that a prior restraint will actually or likely occur. Given *Grosjean* and the facts of *Minneapolis Star,* we find no reason to argue with the holding on the Minnesota use tax, but this case demonstrates the extent to which this Court's preventative language can achieve unreasonable results. Further clarification is therefore required.

Respectfully submitted,

CARTER J. STROUD
Counsel of Record
City Attorney
City of Alameda
City Hall, Room 314
Alameda, California 94501
Attorney for Petitioner